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No. 07-463

IN THE

Supreme Court of the United States

PRISCILLA SUMMERS, *et al.*,
Petitioners,
v.
EARTH ISLAND INSTITUTE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF DOUGLAS TIMBER OPERATORS, MONTANA LOGGING ASS'N, AND MONTANA WOOD PRODUCTS ASS'N AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*

Amici are community-supported organizations representing manufacturing, logging, trucking and supportive businesses of the forest products industry.[1] Douglas Timber Operators represents over 140 members located throughout Southern Oregon. Montana Logging Association and Montana Wood Products Association collectively represent over 600 members located throughout Montana.

Amici have a vital interest in the availability and scope of injunctive relief under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* ("APA") . When courts issue broad injunctive relief affecting Forest Service activities without duly considering hardships to public and private interests, *amici* can be adversely affected. Because *amici* are dependent on federal timber sales to maintain their operations, injunctions which affect the Forest Service's ability to offer these sales can adversely affect *amici's* private business interests.

Such broad injunctions also implicate public interests in that they can have an overall chilling

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

effect on local and national economies, and may hamper Forest Service efforts to execute environmentally beneficial projects. These public interests are also of concern to *amici*.

Amici contend that the court below erred in issuing broad injunctive relief while failing to balance hardships to private and public interests. *Amici* also contend that this case fits into a pattern of the court abusing its discretion in issuing injunctive relief to environmental litigants. *Amici* wish to reaffirm this Court's precedent concerning the applicability of traditional equitable principles to injunctive relief. For these reasons, *amici* support Petitioners.

INTRODUCTION

The Forest Service Decision Making and Appeals Reform Act of 1992 ("ARA"), Pub. L. No. 102-381, Tit. III, § 322, 106 Stat. 1419 (16 U.S.C. § 1612 note), provides that the Forest Service "shall establish a notice and comment process for proposed actions * * * implementing land and resource management plans * * * and shall modify the procedure for appeals of decisions concerning such projects." ARA § 322(a), 106 Stat. 1419. In 2003, the Forest Service promulgated revised ARA rules, several of which were the subject of this litigation in the Eastern District of California below. See 68 Fed. Reg. 33582 (June 4, 2003).

Respondents originally brought suit in the district court challenging both the application of the 2003 regulations to the Burnt Ridge Project timber sale, and specific regulations issued in the 2003

rulemaking that were unrelated to the timber sale. In total, Respondents' suit challenged nine of the rules, two of which the Forest Service applied to the Burnt Ridge Project, 36 C.F.R. §§ 215.4(a) and 215.12(f). Pet. App. 7a. These two regulations provided categorical exclusions ("CEs") from the ARA process for environmentally insignificant projects not subject to documentation under the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq*. ("NEPA").

In March 2004, the Forest Service withdrew the Burnt Ridge Project as part of a settlement in which Respondents' challenges to the project were "dismiss[ed] with prejudice." Gov't C.A. E.R. 90. Thereafter, the district court allowed Respondents to proceed with a facial challenge to all nine regulations.

With the district court acknowledging that the Burnt Ridge Project was "not at issue" in the ensuing litigation (Pet. App. 39a), Respondents proceeded to establish standing entirely upon injuries alleged by Heartwood Plaintiff, Jim Bensman. See Pet. App. 68a-77a. Senior District Judge Singleton concluded that Respondents established standing despite their failure to point to a single specific project or national forest where the regulations were applied and caused them harm. Similarly, he found "the impact of the regulations on Plaintiffs are 'sufficiently direct and immediate as to render the issue[s] appropriate for judicial review at this stage.' " Pet. App. 46a (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 152 (1967)). He went on to

declare five of the nine rules invalid – including 36 C.F.R. §§ 215.4(a) and 215.12(f) – and enjoined the Forest Service from applying them to other projects nationwide. Pet. App. 66a-67a.

On appeal, the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") disagreed, concluding that the facial challenges to the rules were unripe. Pet. App. 13a-15a. However, it upheld the enjoining of the two regulations applied to the Burnt Ridge Project. The Ninth Circuit explained that Respondents' inability to appeal the Burnt Ridge Project constituted the "procedural injury" sufficient to confer standing and that the record created from that litigation remained "sufficiently concrete" to preserve a ripe controversy. Pet. App. 10a, 15a. Despite this abrupt departure in disposition from the district court case where Judge Singleton understood the Burnt Ridge Project to be no longer at issue, the Ninth Circuit affirmed the nationwide injunction. Instead of addressing the remedy in regards to the district court's exercise of equitable discretion below, the Ninth Circuit inexplicably held that the nationwide injunction remained an appropriate remedy because it was "compelled by the text of the [APA]." Pet. App. 21a.

This Court granted the Solicitor General's petition for certiorari on January 18, 2008.

On certiorari, one question presented is: "[w]hether the court of appeals [Ninth Circuit] erred in affirming the nationwide injunction issued by the district court." Pet. I. Respondents maintain that "the courts below *did* exercise their equitable powers

in setting aside the regulations." Respondents' Brief in Opposition ("Opp. Cert.") at 28. In response, Petitioners argue that "the sort of categorical injunction issued by the district court * * * is an inappropriate exercise of a court's equitable powers." Pet. 29. For the reasons set forth below, *amici* support Petitioners.

SUMMARY OF ARGUMENT

After finding that Respondents only presented justiciable claims with respect to those regulations actually applied to the Burnt Ridge Project, the Ninth Circuit committed reversible error when it concluded that the nationwide injunction "is compelled by the text of the [APA]." Pet. App. 21a. The text of the APA does not dictate this result. Rather, traditional equitable discretion controls the remedy in this case.

This Court has made clear that nothing short of an "unequivocal statement" from Congress can displace "traditions of equity practice." *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). No such directive exists in the text of the APA which states in pertinent part:

> "To the *extent necessary* to decision * * * the reviewing court shall decide all relevant questions of law * * *. The reviewing court shall * * * (2) hold unlawful and set aside agency action, findings, and conclusions found to be * * * not in accordance with law * * *."

5 U.S.C. § 706 (emphasis added). Here, the only reviewable agency action identified by the Ninth

Circuit is the Forest Service's proposal of the Burnt Ridge Project.[2] Under traditional equity practice, such an action could seldom ever warrant nationwide relief because the scope of the remedy must bear some nexus to the action challenged. *Lewis v. Casey*, 518 U.S. 343, 358-59 (1996). The text of the APA confirms that Congress did not seek to limit such equitable discretion for remedying unlawful agency actions. The APA provides: "[n]othing herein - (1) affects * * * the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground." 5 U.S.C. § 702. Thus, the nationwide scope of the relief granted below is not mandated by the APA, nor does it reflect an appropriate exercise of equitable discretion under this Court's jurisprudence.

To allow the nationwide injunction to stand would unfairly afford Respondents a remedy wholly disproportionate with the harm alleged under the

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[2] Under the APA, right to relief depends on a plaintiff's ability to show they are "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action." 5 U.S.C. § 702. Under this Court's ripeness jurisprudence, this requires a "concrete action applying the regulation to the claimant." *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 891 (1990). Thus, ordinarily an agency regulation is not itself a reviewable action under the APA unless a regulation affects the "primary conduct" of plaintiff. *National Park Hospitality Ass'n v. Dep't of the Interior*, 538 U.S. 803, 810 (2003). Here, the Ninth Circuit relied exclusively on the Burnt Ridge project to find Respondents' challenges to 36 C.F.R. §§ 215.4(a) and 215.12(f) justiciable. Pet. App. 9a-15a.

Burnt Ridge Project. This result offends bedrock principles of traditional equity practice. See *Hecht,* 321 U.S. at 329 ("The essence of equity jurisdiction has been * * * to mould each decree to the necessities of the particular case."); *Califano v. Yamasaki,* 442 U.S. 682, 702 (1979) ("[T]he scope of injunctive relief is dictated by the extent of the violation established.").

Within the Ninth Circuit, such overbroad relief is not limited to the present case. Rather, such practice is part of a systemic pattern of issuing broad injunctive relief whenever claimants allege environmental harm. Such categorical approaches to injunctive relief runs afoul of traditional equitable balancing framework. An injunction does not "mechanically" follow for every violation of the law. *Tennessee Valley Auth. v. Hill,* 437 U.S. 153, 193 (1978). Rather, a court must consider the "effect on each party of the granting and withholding of the requested relief." *Amoco Prod. Co. v. Village of Gambell,* 480 U.S. 531, 542 (1987). Here, the extraordinary remedy upheld in this case reflects, at most, a nominal regard for all the interests at stake.

ARGUMENT

I. THE TEXT OF THE ADMINISTRATIVE PROCEDURE ACT DOES NOT COMPEL THE ISSUANCE OF A NATIONWIDE INJUNCTION

The Ninth Circuit erred in affirming that "[t]he nationwide injunction * * * is compelled by the text

of the [APA]." Pet. App. 21a; compare to 5 U.S.C. § 706.[3] An injunction is an equitable remedy "that does not issue as of course." *Amoco,* 480 U.S. at 542. To supplant judicial equitable discretion, this Court requires a clear Congressional mandate. *Hecht,* 321 U.S. at 330 ("[I]f Congress desired to make such an abrupt departure from traditional equity practice * * * it would have made its desire plain."); see Ronald Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 Duke L.J. 291, 309-15 (Nov. 2003).[4] A statutory analysis of the APA illustrates that: (1) a compulsory nationwide injunction does not replace traditional equitable discretion; and (2) the context of the various APA provisions limits injunctive relief to remedying only the legal wrong suffered by the person affected by the specific agency action.

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[3] 5 U.S.C. § 706 states in relevant part:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine meaning or applicability of the terms of an agency action. The reviewing court shall * * * (2) hold unlawful and set aside agency action, findings, and conclusions found to be -- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law * * *.

[4] Levin's law review article provides an in-depth discussion of the import and influence of *Hecht* on equitable discretion jurisprudence. This article also presents a statutory interpretation of the APA § 706 which supports the ruling in *Hecht* against finding limits on remedial equitable discretion unless explicitly expressed by Congress.

Affirming the nationwide injunction flatly eliminates traditional judicial equitable discretion to tailor injunctive relief to the specific matter. This Court treats an injunction as an equitable remedy, which is flexible in nature. *Hecht,* 321 U.S. at 329-30. The APA is consistent with this principle of flexibility and states in pertinent part:

> [n]othing herein * * * affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny any relief on any other appropriate legal or equitable ground * * *."

5 U.S.C. § 702.

The text of APA § 702 clearly establishes that Congress intended to retain equitable discretion within the APA. Though equitable discretion is flexible, injunctive relief must also be narrowly tailored to address the specific harm. A court must "mould each decree to the necessities of the particular case." *Hecht*, 321 U.S. at 329; see also *Califano,* 442 U.S. at 702 ("[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to plaintiffs."). Similarly, the text of the APA § 706 allows a reviewing court to set aside an unlawful agency action, but only "to the extent necessary to [the] decision." 5 U.S.C. § 706. The phrase "to the extent necessary to [the] decision" requires a remedy that is narrowly tailored to the specific harm. At issue are the two regulations actually applied to the Burnt Ridge Project – 36 C.F.R. §§ 215.4(a) and 215.12(f).

Accordingly, the injunctive relief should only apply to the Burnt Ridge Project.

By not limiting the injunctive relief "to the extent necessary to [the] decision," the Ninth Circuit improperly broadens the scope of the APA § 706. This Court holds "that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Owasso Indep. Sch. Dist. No. I-011. v. Falvo*, 534 U.S. 426, 434 (2002) (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989)). The APA § 706 is prefaced with "to the extent necessary to decision." 5 U.S.C. § 706. By concluding that the APA compels a nationwide injunction, the Ninth Circuit ignores the parameters set forth by the APA. The Ninth Circuit disregards that the plain meaning of "to the extent necessary to decision," within the context of the APA, provides a reviewing court the equitable discretion to mould the remedy to the specific harm. Here, enjoinment of the vacated regulations – 36 C.F.R. §§ 215.4(a) and 215.12(f) – should apply only to the specific harm at issue, the Burnt Ridge Project.

Statutory analysis of the APA § 706 also confirms that Congress did not intend to replace traditional equitable discretion with a compulsory nationwide injunction. This Court holds that a statute "should not be read as a series of unrelated and isolated provisions." *Gonzalez v. Oregon,* 546 U.S. 243, 273 (2006) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995)). APA § 702 applies judicial review to "a person suffering the legal wrong

because of [an] agency action, or adversely affected or aggrieved." 5 U.S.C. § 702. In *Norton v. S. Utah Wilderness Alliance,* 542 U.S. 55, 62 (2004), this Court restricts the agency action to discrete actions as found in various definitions throughout the APA. See 5 U.S.C. § 551(4), (6), (8), (10), (11), and (13). Also, in *Norton*, this Court reiterates that the harm for which relief is sought under the APA must have a nexus to the discrete action. *Norton*, 542 U.S. at 64. (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. at 891). Under this Court's analysis, any equitable remedy resulting from a judgment under the APA § 706 is limited to addressing the harm suffered by the specific person.[5] Thus, the Ninth Circuit errs in affirming the nationwide injunction because Respondents receive relief beyond that necessary to redress the harm resulting from the Burnt Ridge Project.

The above statutory analysis establishes that Congress did not expressly remove equitable discretion from the APA. Injunctive relief under the

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[5] Whether the agency action is a site-specific project such as the Burnt Ridge Project or a facial challenge of the regulations 36 C.F.R. §§ 215.4(a) and 215.12(f), the text of the APA restricts the judicial review to the person suffering the legal wrong and does not compel it to be a broad application throughout the nation. In *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 193 (2000), this Court notes that "federal courts should aim to ensure 'the framing of relief no broader than required by the precise facts.' " If the precise facts warrant a nationwide injunction then the court has judicial discretion to issue it; in this case, however, the facts require the injunctive relief be limited to the Burnt Ridge Project.

APA complies with traditional equitable discretion as applied throughout the federal courts system. The power of injunctive relief to burden a defendant, beyond that necessary to effectively address plaintiff's harm, requires equitable discretion be available to a reviewing court. In *Va. Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379, 393-94 (4th Cir. 2001), the Fourth Circuit Court of Appeals states that the language of the APA does not require an issuance of a nationwide injunction upon finding a facially challenged regulation unconstitutional. As District of Columbia Circuit Judge Silberman stated:

> Injunctions against the government are perfectly appropriate when necessary to prevent harm to specific individuals. But we ought not forget that an injunction is the most powerful civil order available to the judiciary and should not be used merely as a device to shape desirable administrative action.

Harmon v. Thornburgh, 878 F.2d 484, 499 (D.C. Cir. 1989) (Silberman, J., concurring in part and dissenting in part). In misinterpreting the APA to compel a nationwide injunction, the Ninth Circuit steps beyond the text of the APA and discards the traditional equitable discretion provided within the text of the APA.

II. THE NATIONWIDE INJUNCTION DOES NOT COMPORT WITH TRADITIONAL EQUITABLE DISCRETION

This Court has made clear the remedial role of a court sitting in equity:

> The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it.

Hecht, 321 U.S. at 329. Under these principles, a court must tailor the scope of relief to the injuries actually established in the case. *Califano*, 442 U.S. at 702; see *Lewis v. Casey,* 518 U.S. at 358. Yet, the nationwide injunction in this case bears no nexus to the harm Respondents established at the appellate level. Thus, the scope of the remedy upheld by the Ninth Circuit violates the bedrock principle of equity practice that courts "mould" the remedy to the actual harm shown.

Beyond the fact that the scope of the remedy fails to comport with traditional equitable discretion as a threshold matter, the nationwide injunction also disregards the public interests at stake in this case. An injunction is an extraordinary remedy appropriate only with "irreparable injury and the inadequacy of legal remedies." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). In fashioning an injunction, a court must balance the conveniences and possible injuries to the affected parties. *Id.* at 312 (citing *Yakus v. U.S.*, 321 U.S. 414, 440 (1944)). In conjunction with balancing the effects on each party, this Court has also recognized the "important role of the 'public interest' in the exercise of equitable discretion." *Amoco*, 480 U.S. at 545; see also *Romero-Barcelo*, 456 U.S. at 312-13.

Here, the nationwide injunction reflects inadequate consideration of its effect on the Forest Service, the timber industry and communities dependent on timber harvest. Furthermore, the injunction does not consider the expressed intent of Congress to encourage and expedite post-fire salvage logging due to the time-sensitive nature of such projects. In sum, the injunction was formulated without properly balancing the hardships on the parties, and with an utter disregard of the public interests at stake. These failures not only conflict with decisions of this Court, but the outcome also reflects a growing trend within the Ninth Circuit of adopting a categorical approach to injunctive relief in environmental cases.

A. The Nationwide Injunction has No Nexus to Respondents' Injuries

It is clear from this Court's precedents that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano*, 442 U.S. at 702. The district court acknowledged as much in denying Petitioners' motion to amend judgment when it correctly stated that the "relief should be narrowly tailored to address the specific harm shown." Pet. App. 32a. However, the harm the district court addressed was the general harm Respondents alleged from being "precluded from meaningful involvement in Forest Service project *proposals*." Pet. App. 45a (emphasis added). Yet, after Ninth Circuit review, the only *proposal* which established injury for Respondents was the very project

explicitly omitted from consideration by the district court – the Burnt Ridge Project. Rather than remand the issue to the district court to amend judgment for consistency with this finding, the Ninth Circuit took the inexplicable step of affirming the remedy as a matter of law under the APA – a basis not conceived of at the district court level. Thus, notwithstanding the appropriateness of nationwide relief had Respondents established injury beyond the application of the Burnt Ridge Project, the remedy here no longer comports with traditional notions of equitable discretion.

The district court found the nationwide-scope of its injunction necessary to "adequately redress the harm suffered by [Respondents]." Pet. App. 32a. However, with regard to the "specific harm" at issue here, the district court apparently believed it was solely redressing a broad, nationwide harm stemming from the Forest Service's regulations implementing the ARA. In the court's view, the issue "evolved" into a facial challenge of these regulations; thus, the court believed it was empowered to remedy harms wholly independent of the previously settled issue regarding the proposed Burnt Ridge Project.[6] Nevertheless, this case currently stands, the Ninth Circuit only upheld the injunction of the two

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[6] In the opening of the district court's opinion in the July 2, 2005 order addressing Respondents' facial challenge, Judge Singleton stated that that the "Burnt Ridge timber sale is not at issue in this case. Only the challenges to the administrative appeal rules remain." Pet. App. 39a.

regulations which were actually applied to the Burnt Ridge Project – 36 C.F.R. §§ 215.4(a) and 215.12(f).

Under the Ninth Circuit's reasoning, it was Respondents' inability to appeal the Burnt Ridge Project as a result of the regulations that constituted the "procedural injury" necessary for conferring standing in this case. Pet. App. 9a-10a. Likewise, the Ninth Circuit relied upon the application of the two regulations to the Burnt Ridge Project in finding ripeness, indicating that the record on that issue "remains sufficiently concrete to permit [review]." Pet. App. 15a. However, despite these departures from the district court's opinion, the Ninth Circuit affirmed the nationwide injunction based on the erroneous belief that the remedy "is compelled by the text of the [APA]." Pet. App. 21a. The result afforded Respondents a remedy wholly incongruous with the injury upon which they established standing and ripeness before the Ninth Circuit because the remedy was originally "moulded" by the district court to address harms entirely independent from the Burnt Ridge Project.

When the Ninth Circuit correctly narrowed the injury in this case to the Burnt Ridge Project, the scope of the relief available should have narrowed accordingly. In *Lewis v. Casey*, systemwide relief was not appropriate because only one named plaintiff established actual injury:

> the cause of that injury – the inadequacy which the suit empowered the court to remedy – was failure of the prison to provide the special services that [plaintiff] would have

> needed, in light of his illiteracy, to avoid dismissal of his case. At the outset, therefore, we can eliminate from the proper scope of this injunction provisions directed at special services or special facilities required by non-English speakers, by prisoners in lockdown, and by the inmate population at large.

518 U.S. at 358; see also *Dayton Bd. of Ed. v. Brinkman,* 433 U.S. 406, 417 (1977) ("[I]nstead of tailoring a remedy commensurate to the three specific violations, the Court of Appeals imposed a systemwide remedy going beyond their scope."). Respondents in this case only established injury with regards to the Burnt Ridge Project; therefore, nationwide relief is far beyond the outer limits of what the courts below were "empowered to remedy."

Curiously, the proper scope of an injunction is not an issue the Ninth Circuit has ignored entirely. In fact, the Ninth Circuit has stated:

> [A]n injunction must be narrowly tailored to affect only those persons over which it has power, and to remedy only the specific harms shown by the plaintiffs, rather than to enjoin all possible breaches of the law.

Price v. City of Stockton, 390 F.3d 1105, 1117 (9th Cir. 2004) (internal quotations marks omitted). Moreover, the Ninth Circuit recently narrowed the scope of an injunction of a Forest Service rule found to be arbitrary and capricious under § 706 of the APA. *Sierra Club v. Bosworth*, 510 F.3d 1016, 1034 (9th Cir. 2007) ("The injunction shall be limited to those projects for which the Forest Service did not

issue approval prior to the initiation of this lawsuit."). The Ninth Circuit's disposition in *Bosworth* is irreconcilable with the present case. Considering that the Ninth Circuit saw the necessity of identifying the scope and balancing the hardships in formulating a remedy in *Bosworth*, it is inconceivable how the same is not required here – especially since both actions were brought under § 706 of the APA.

Respondents' view that the courts below balanced the equities in ordering a nationwide injunction mischaracterizes the tenuous foundation on which the remedy actually rests. See Opp. Cert. 28. On the contrary, Respondents unfairly gain a windfall by virtue of a remedy that was originally formulated to address injuries not recognized as ripe by the Ninth Circuit. Here, the injury recognized by the Ninth Circuit was limited to the application of the Forest Service regulations to the Burnt Ridge Project. It is true that "the scope of a district court's equitable powers to remedy past wrongs is broad," but "the nature of the violation determines the scope of the remedy." *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, 15 - 16 (1971); see also *Missouri v. Jenkins,* 515 U.S. 70, 88 (1995). The nature of the injury recognized by the Ninth Circuit is so limited and incongruous with the nature of the injury addressed by the district court that the remedy cannot be said to fairly reflect an exercise of traditional equitable discretion.

B. The Nationwide Injunction Fails to Adequately Consider the Competing Interests at Stake

By incorrectly relying on the APA to uphold the nationwide injunction, the Ninth Circuit also affirmed a remedy that fails to reflect more than a nominal regard for the interests of the Forest Service and the public in conducting post-fire salvage projects. Under *Amoco*, a court must consider both the "effect on each party of the granting or withholding of the requested relief," and the public interests at stake in the outcome of the case. 480 U.S. at 542, 545. In this case, the remedy conflicts with decisions of this Court under both prongs.

In balancing the parties' equities in this case, the district court recognized the Forest Service's "interest in fully developing the legal issues implicated" by the regulations. Pet. App. 32a. However, citing concerns over the "wasteful" use of "overtaxed appellate resources," as well as "agency energies," the court went on to issue the nationwide injunction. *Id.* This rationale runs afoul of the prudential considerations this Court emphasized in holding that nonmutual collateral estoppel does not apply to the United States because it would "substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular issue." *U.S. v. Mendoza,* 464 U.S. 154, 160 (1984). Thus, even assuming *arguendo* that the district court's nationwide injunction was an exercise of equitable discretion applicable to the harms indentified by the Ninth

Circuit, the remedy still offends principles of judicial equitable discretion.

In essence, the result this Court sought to avoid in *Mendoza* threatens to take hold in this context where the government is again forced to seek immediate review from this Court to appeal invalidated regulations. Moreover, interested parties, such as *amici*, are similarly prejudiced by such orders that deny them the benefit of regulations and programs in jurisdictions that otherwise would not be subject to a particular federal district's ruling. To allow any single district court to invalidate regulations nationwide on the basis of an "as-applied" challenge threatens to subject entities such as *amici* to tremendous uncertainty in an already very litigious industry. Such public interests are among those regularly ignored within the Ninth Circuit.

In an environmental context, this Court has stated that "the balance of the harms will usually favor the issuance of an injunction to protect the environment." *Amoco*, 480 U.S. at 545. However, it is still clear that an injunction does not "mechanically" follow for every violation of the law. *Tennessee Valley Auth.,* 437 U.S. at 193. Certainly, an injunction of the broadest scope possible – here, of nationwide effect – does not issue as a matter of course either. Yet, the Ninth Circuit has improperly interpreted *Amoco* by inconsistently applying the balancing framework and increasingly affording many of the public interests at stake only a nominal regard. This has resulted in a growing trend within the Ninth

Circuit of issuing overbroad injunctive relief to environmental litigants. See Pet. 30-31.[7]

The Ninth Circuit recently explained its view of the role of injunctive relief in environmental cases as follows:

> We have held time and again that the public interest in preserving nature and avoiding irreparable environmental injury outweighs economic concerns.

Lands Council v. McNair, 494 F.3d 771, 780 (9th Cir. 2007), *rehearing en banc granted*, 512 F.3d 1204 (9th Cir. 2008).[8] The Ninth Circuit's reliance on this presumption is inconsistent with *Amoco*, where this Court rejected presumptive approaches to injunctive relief as being "contrary to traditional equitable

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[7] Petitioners appropriately point to a number of district court cases within the Ninth Circuit where environmental litigants were afforded overbroad relief.

[8] An example of how this presumption leads to inequitable results is *Earth Island Inst. v. U.S. Forest Service,* 442 F.3d 1147, (9th Cir. 2006) (Enjoining post-fire restoration projects on the El Dorado National Forest). In considering the Forest Service's and Intervenor's potential economic losses, the court of appeals categorically determined these interests were outweighed by potential injury to the environment because they had previously held that a "*cruise ship's* loss of anticipated revenues * * * does not outweigh the potential irreparable damage to the environment." *Id.* at 1177 (emphasis added) (internal quotations omitted).

principles." 480 U.S. at 545. Despite acknowledging that environmental harm is "often" irreparable, this Court struck down the Ninth Circuit's approach of *presuming* irreparable injury whenever an agency "fails to evaluate thoroughly the environmental impact of a proposed action." *Id.* at 544, 545 (citing *People of Gambell v. Hodel,* 774 F.2d 1414, 1423 (9th Cir. 1985)). Thus, there is a clear divergence between this Court's view of the appropriate exercise of equitable balancing and the categorical approach the Ninth Circuit again teeters upon. At the very least, such practices within the Ninth Circuit beg the question of whether the balancing of hardships analysis has been largely reduced to a mechanical exercise. This is especially true in regards to considering all the public interests at stake.

The Ninth Circuit has recognized the public interest is "better seen as an element that deserves separate attention" from balancing hardships to the parties. *Sammartano v. First Judicial Dist. Court,* 303 F.3d 959, 974 (9th Cir. 2002). Here, no such consideration was made at all by either of the courts below. This kind of inconsistency is not unique to the present controversy within the Ninth Circuit.[9] Such

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[9] The Ninth Circuit frequently fails to address public interests beyond those represented by environmental plaintiffs. *See Lands Council v. Martin*, 479 F.3d 636, 643 (9th Cir. 2007) (Where the Ninth Circuit failed to acknowledge the hardships to the parties or the public interest in overturning the district court's denial of preliminary injunction of several post-fire logging sales in the Umatilla National Forest solely because plaintiffs established a "strong likelihood of success."; *Earth*

(continued…)

as is the case in balancing the interests of the parties, the Ninth Circuit too easily brushes aside economic considerations from the public interest determination as well. These categorical approaches to injunctive relief unfairly burden resource-dependent industries and communities and ignore the public interests benefited by timber harvest.

Here, in the post-fire salvage context, there is an especially prominent public benefit in harvesting burned timber efficiently and expeditiously. The Burnt Ridge Project called for the logging of 238 acres of forest that burned in the McNally Fire, a wildfire which burned over 150,000 acres within the Sequoia National Forest. Pet. App. 6a, 7a. Congress has recognized the public interest of recovering some economic value from burned timber on federal lands in various provisions of the National Forest Management Act of 1976, 16 U.S.C. § 1600, *et seq*. ("NFMA"). See 16 U.S.C. § 1604(g)(2)(F)(iv) (exempting salvage from maximum harvest opening limits); *id*. at § 1604(k) (allowing salvage on lands not otherwise suitable for timber harvest); *id*. at § 1604(m)(1) (exempting salvage from minimum tree age requirements). Because burned wood decomposes and loses value quickly following a fire,

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Island Inst. v. U.S. Forest Service, 442 F.3d at 1177 (Where the only public interest acknowledged was "[t]he preservation of our environment, as required by NEPA and the NFMA [National Forest Management Act of 1976, 16 U.S.C. § 1600, *et seq*.].").

the public interest is best served when post-fire salvage is expedited. See for example John Sessions et. al., *The Biscuit Fire: Management Options for Forest Regeneration, Fire and Insect Risk Reduction and Timber Salvage* (2003) at 5 ("The loss in value of dead trees from decay and insects is about 22% after the first year."). The regulations at issue address the realities of salvage logging. In doing so, the regulations exempt projects categorically excluded from NEPA from the ARA appeals process. This seeks to prevent the loss of timber value due to unnecessary delay. Yet, these interests were not considered by the Ninth Circuit when it affirmed the nationwide injunction.

Petitioners correctly assert that the proper remedy under the APA for an injury based on a site-specific application of regulations – here, the Burnt Ridge Project – is to hold the challenged action unlawful, not "all of its potential applications to *other* site-specific decisions." Pet. 27-28. As shown above, this result is directed by notions of equitable discretion as much as the purpose and function of the APA. There must be a nexus between the remedy issued and harm demonstrated. The Court should not let the remedy in this case rest on a misinterpretation of the remedial authority of a court under the APA. Rather, the remedy should be vacated and the case remanded to reflect traditional notions of equitable discretion.

CONCLUSION

For the reasons stated above, Douglas Timber Operators, Montana Logging Association, and

Montana Wood Products Association respectfully request that the Court reverse the judgment of the United States Court of Appeals for the Ninth Circuit, vacate the nationwide injunction, and remand the matter for an equitable remedy narrowly tailored to the specific harm.

Respectfully submitted,

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